Supreme Court, U.S.
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No. 01-

In the
Supreme Court of the United States

TIG INSURANCE COMPANY, INC., and
TIG PREMIER INSURANCE COMPANY, INC.,
Petitioners,

v.

REVENUE DIVISION, DEPARTMENT OF
TREASURY, STATE OF MICHIGAN,
Respondent.

Petition For Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where the Michigan Legislature amended the Michigan retaliatory tax calculation for the actual purpose of increasing Michigan revenues from non-Michigan insurers, did the Michigan Supreme Court err in reversing the Michigan Court of Appeals and in holding that the amendment did not violate the Equal Protection Clause on the bases of a court-conceived theoretical governmental purpose for the amendment and of an unsupportable assertion that the retaliatory tax still achieved its stated governmental purpose after the amendment?

PARTIES TO THE PROCEEDING

All the parties are named in the caption.

STATEMENT PURSUANT TO RULE 29.6

Fairfax Financial Holdings Limited, a publicly traded Canadian corporation, owns 100% of Odyssey Re Holdings Ltd., a Canadian corporation. Odyssey Re Holdings Ltd. owns 100% of Odyssey Re Group Ltd., a Canadian corporation. Odyssey Re Group Ltd. owns 100% of Fairfax, Inc., a Wyoming corporation. Fairfax, Inc. owns 100% of TIG Holdings, Inc., a Delaware corporation. TIG Holdings, Inc. owns 100% of TIG Insurance Group, a California corporation. TIG Insurance Group owns 100% of TIG Insurance Company, Inc., a party to this proceeding. TIG Insurance Company, Inc. owns 100% of TIG Premier Insurance Company, Inc., a party to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

TIG Insurance Company, Inc. and TIG Premier Insurance Company, Inc. respectfully petition for a writ of certiorari to review the judgment and opinion issued by the court below.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 629 N.W.2d 402 (Mich. 2001) and is set forth in its entirety in the Appendix hereto at A-1. The opinion of the Michigan Court of Appeals, reversed by the Michigan Supreme Court, is reported as *TIG Insurance Co. v. Department of Treasury*, 602 N.W.2d 839 (Mich. Ct. App. 1999) and is set forth in the Appendix at A-23. The opinion of the Michigan Court of Claims, affirmed by the Michigan Court of Appeals, is unpublished and is set forth in the Appendix at A-42.

JURISDICTION

The decision below was issued by the Michigan Supreme Court on July 3, 2001, and judgment was entered on that date. Petitioners herein, TIG Insurance Company, Inc. ("TIG Insurance") and TIG Premier Insurance Company, Inc. ("TIG Premier") (collectively "TIG"), did not file a petition for rehearing. In accordance with 28 U.S.C. § 2101(c) (1994), this Petition is filed within ninety days of the date judgment was entered. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Equal Protection Clause of the United States Constitution, U.S. CONST. amend. XIV, § 1; MICH. COMP. LAWS ANN. § 500.134(5) and (6) (West Supp.1993); and MICH. COMP. LAWS ANN. § 500.476a(1) and (2) (West Supp. 1993) are set forth in the Appendix at A-52, A-53, and A-55, respectively.

STATEMENT OF THE CASE

This case is based on a stipulated record, and the relevant facts are not in dispute.

TIG Insurance and TIG Premier are insurance companies incorporated in the State of California, each with its principle place of business in Texas. Each is licensed to conduct the business of insurance in the State of Michigan, and each did so during 1996.

Michigan imposes two types of taxes on insurance companies doing business in the state: the single business tax ("SBT") (a value-added tax assessed for the privilege of doing business in Michigan) imposed on all insurance companies, MICH. COMP. LAWS ANN. § 208.1 *et seq.* (West

1983), and a retaliatory tax[1] imposed on certain foreign insurers,[2] MICH. COMP. LAWS ANN. § 500.476a (West Supp. 1993). The retaliatory tax statute provides in pertinent part:

> [W]henever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required . . . to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is

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[1] Almost every state levies a retaliatory tax on out-of-state insurance companies transacting business within its boundaries. A retaliatory tax is designed to mirror the burdens and limitations another state imposes on out-of-state insurance companies doing business in that state when those burdens and limitations exceed the burdens and limitations the enacting state imposes on out-of-state insurance companies. A form of retaliatory tax has been in effect in Michigan for more than a century.

[2] In the insurance context, a "foreign" company is a U.S. company that is domiciled outside of the state in question. Thus, as used in this petition, foreign insurers are U.S. insurance companies domiciled outside of Michigan.

> required, as a condition precedent to its transacting business in this state, to . . . pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country.

MICH. COMP. LAWS ANN. § 500.476a(1).

The foregoing tax framework was adopted by the Michigan Legislature in 1987. At the time the legislation was enacted, the total revenue to be collected from insurance companies doing business in Michigan was projected to be about $170 million for 1988, with about $100 million of that coming from foreign insurers under the retaliatory tax. By mid-1988, however, it had become clear that actual revenue from taxes on insurers would be substantially below the projections for that year. In order to reduce the projected revenue shortfall, the Michigan Legislature amended the Michigan Insurance Code to modify the calculation of the Michigan

retaliatory tax and thereby increase tax revenue from foreign insurers without increasing taxes imposed on domestic insurers.

Michigan has a number of insurance associations and facilities (collectively "facilities") created by the Michigan Legislature and funded by assessments imposed by law on insurance companies doing business in Michigan. Assessments levied by these state-mandated insurance facilities had long been considered burdens included in the retaliatory tax calculations of foreign insurers under the predecessor to section 500.476a. Moreover, under section 500.476a as enacted in 1987, assessments imposed by state-mandated insurance facilities were included in "taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or any special burden or other burden" when calculating the Michigan retaliatory tax.

Faced with its revenue shortfall, the Michigan Legislature in 1988 amended the retaliatory tax calculation to remove assessments levied by certain of the Michigan insurance facilities, and by similar insurance facilities formed by other states, from the calculation.[3] The

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[3] The amendment regarding the removal of assessments from the retaliatory tax calculation is codified at MICH. COMP. LAWS ANN. § 500.134(5) (West Supp. 1993);

(continued...)

Michigan facilities named in the legislation were: (1) the Worker's Compensation Placement Facility, (2) the Basic Property Insurance Association, (3) the Catastrophic Claims Association, (4) the Automobile Insurance Placement Facility, (5) the Life and Health Insurance Guaranty Association, and (6) the Property and Casualty Guaranty Association.[4] It was projected that the 1988 Amendment would increase Michigan revenues for the 1988 fiscal year from foreign insurers by between $10 million and $20 million.

Both the Michigan Court of Claims and the Michigan Court of Appeals determined that the purpose of MICH. COMP. LAWS ANN. § 500.134(5) (West Supp. 1993) was to generate revenue at the expense of foreign insurers. *TIG Insurance Company, Inc. v. Revenue Division, Department of Treasury, State of Michigan*, File Nos. 96-16428-

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[3](...continued)
and the list of facilities is codified at MICH. COMP. LAWS ANN. § 500.134(6) (West Supp. 1993). The amendment hereinafter is referred to as the "1988 Amendment."

[4] A seventh facility, the Assigned Claims Facility, was added to the list in 1990. However, the amending legislation was subsequently invalidated in another case by the Michigan Court of Claims, as explained by the Michigan Court of Appeals in this case. *TIG*, 602 N.W.2d at 843 n.5. As a result, assessments by the Assigned Claims Facility continue to be included in Michigan burdens for purposes of the retaliatory tax statute.

CM and 96-16429-CM at 22 (Mich. Ct. Cl. Oct. 1, 1997) (hereinafter cited as Bench Op.); *TIG*, 602 N.W.2d at 846. There is no evidence that the Michigan Legislature considered any other purpose for the 1988 Amendment.

TIG timely filed Insurance Company Annual Returns ("Returns") for the 1996 tax year with the Revenue Division of the Michigan Department of Treasury ("DOT") reporting and paying retaliatory taxes computed as required by sections 500.476a and 500.134(5). On February 26, 1997, TIG timely filed amended Returns for the 1996 tax year to include in its aggregate burdens for retaliatory tax purposes assessments TIG paid in 1996 to facilities listed in section 500.134(6). The four facilities involved were: (1) the Worker's Compensation Placement Facility, (2) the Basic Property Insurance Association, (3) the Automobile Insurance Placement Facility, and (4) the Assigned Claims Facility.[5] TIG's 1996 amended Returns showed overpayments of retaliatory taxes. TIG claimed credits against 1997 Michigan tax liabilities for such

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[5] As noted above, the legislation adding the Assigned Claims Facility to the list in section 500.134(6) of the Michigan Insurance Code was held to be unconstitutional. *See supra* note 4. Thus, the parties stipulated that TIG Insurance Company was entitled to a refund of 1996 retaliatory tax in the amount of $30,078, the amount of assessment it paid in 1996 to the Assigned Claims Facility.

overpayments.[6] The Michigan DOT denied the claims.

TIG appealed the denial of the claims to the Michigan Court of Claims, arguing that section 500.134(5) violated the Equal Protection Clause of the United States Constitution and the corresponding provision in the Michigan Constitution as well as the Michigan Constitution's Uniformity of Taxation Clause. The Michigan Court of Claims found that the 1988 Amendment was not enacted for a legitimate state purpose, and held that the 1988 Amendment violated the Equal Protection Clause, citing *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981). Bench Op. at 23. The Michigan Court of Appeals affirmed, stating:

> It is abundantly clear that [the 1988 Amendment] was enacted as a stop-gap measure to raise funds in response to a projected shortfall in insurance tax revenues. This is not a valid reason for discriminating against foreign insurers. . . . For this

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[6] The original claims in this case included claims for taxes paid for 1990 and 1991. The Michigan Court of Claims held that the claims for those two years were time barred and the Michigan Court of Appeals affirmed. TIG did not appeal that decision to the Michigan Supreme Court and those claims are not at issue here.

> reason, we find unconstitutional the 1988 amendments of the retaliatory tax that exclude third-party assessments as a "burden" for purposes of computing the retaliatory tax.

TIG, 602 N.W.2d at 845-46 (footnotes and citation omitted).

The Michigan Supreme Court reversed, holding that the 1988 Amendment was rationally related to a legitimate state purpose. *TIG Insurance Co. v. Revenue Division, Department of Treasury, State of Michigan*, 629 N.W.2d 402, 410 (Mich. 2001). The court did not disturb the lower courts' determinations that the actual purpose of the 1988 Amendment was to raise revenues from foreign insurers. Instead, the court theorized that:

> The Legislature could have believed that if it did not require payments to these facilities not to be excluded from the retaliatory tax burden, other states would not be discouraged from establishing similar facilities to grant the same benefit to insurers doing business in those states, including Michigan insurers.

Id. at 408.

REASONS FOR GRANTING THE PETITION

The decision of the Michigan Supreme Court directly conflicts with *Western & Southern* and *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), each of which involved the validity of state insurance taxes under the Equal Protection Clause. A state may not impose "more onerous taxes or other burdens" on out-of-state corporations doing business within its boundaries than it does on domestic corporations unless: (1) the challenged legislation has a legitimate purpose and (2) it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. *Western & Southern*, 451 U.S. at 668; *Metropolitan Life*, 470 U.S. at 875. The actual purpose of the 1988 Amendment was to raise Michigan revenues from foreign insurance companies, and the Michigan Supreme Court erred in theorizing an alternative and illogical purpose in order to hold that the 1988 Amendment did not violate the Equal Protection Clause. *See, e.g., Weinberger v. Wiesenfield*, 420 U.S. 636, 648 (1975); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973). Moreover, after the 1988 Amendment, the Michigan retaliatory tax statute no longer achieved its stated purpose of deterring other states from enacting discriminatory or excessive taxes, because it selectively excluded burdens from the calculation and thereby became a device to raise revenues at the expense of foreign insurers.

I.

THERE WAS NO LEGITIMATE STATE PURPOSE FOR THE REMOVAL OF THE STATE-MANDATED ASSESSMENTS FROM THE RETALIATORY TAX CALCULATION

A.

The Michigan Legislature's Purpose For the 1988 Amendment Constitutes an Impermissible State Purpose Under *Western & Southern* and *Metropolitan Life*

This Court has held that a "legitimate state purpose" supporting retaliatory tax statutes is to "promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes." *Western & Southern*, 451 U.S. at 668. On the other hand, this Court has stated that an unacceptable purpose of retaliatory tax legislation is "to generate revenue at the expense of out-of-state insurers." *Id.* at 669-670; *see also Metropolitan Life*, 470 U.S. at 880. Both the Michigan Court of Claims and the Michigan Court of Appeals found that the actual legislative purpose of the 1988 Amendment was just that - - to raise revenue at the expense of foreign insurers. Bench Op. at 22; *TIG*, 602 N.W.2d at 846. On the basis of this finding, which was not disturbed by the Michigan Supreme Court, the Michigan Legislature's

purpose for the 1988 Amendment was constitutionally impermissible.

B.

The Michigan Supreme Court Erred in Theorizing a State Purpose for the 1988 Amendment In the Face of Clear Evidence That the Michigan Legislature Actually Had a Different Purpose

Without disturbing the findings of the lower courts that the Michigan Legislature's actual purpose for the 1988 Amendment was not a legitimate state purpose under the Equal Protection Clause, the Michigan Supreme Court constructed its own theoretical state purpose for the 1988 Amendment, stating that:

> The Legislature could have believed that if it did not require payments to these facilities not to be excluded from the retaliatory tax burden, other states would not be discouraged from establishing similar facilities to grant the same benefit to insurers doing business in those states, including Michigan insurers.

TIG, 629 N.W.2d at 408.

This theorized purpose for the 1988 Amendment was not supported by any evidence

in the record.[7] This is not a case in which the legislature was silent about the purpose of its actions and the court was left to speculate about possible purposes for the 1988 Amendment. To the contrary, this is a case in which the Michigan Legislature's actual purpose for the 1988 Amendment was absolutely clear from the record as determined by the two lower courts, and that purpose was impermissible under the Equal Protection Clause.

The Michigan Supreme Court cited *Clements v. Fashing*, 457 U.S. 957, 963 (1982) and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) for the proposition that to successfully challenge legislation under the Equal Protection Clause one must show that the legislation is based "'solely on reasons totally unrelated to the pursuit of the state's goals,'" or in other words, one must "'negative every conceivable basis which might support'" the legislation. *TIG*, 629 N.W.2d at 407. Those cases are not on point. The quotes relate to whether the legislation is rationally related to a *legitimate state purpose*. In this case, the Michigan Legislature

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[7] Michigan Supreme Court Justice Kelly, in her concurrence, recognized that "[i]t seems unlikely that [i.e., the court's theorized purpose] was the legislature's purpose because, as stated by the majority, the amendment appeared when the legislature discovered that retaliatory tax revenue was far less than expected." *TIG*, 629 N.W.2d at 411.

had an impermissible purpose for the 1988 Amendment, and the Michigan Supreme Court conceived a purpose for the legislation that it thought "could" be legitimate. Neither the cases the Michigan Supreme Court cites nor any other cases this Court has decided support a conclusion that, to prove the challenged legislation is unconstitutional, TIG had to anticipate and negate the Michigan Supreme Court's theory about why the 1988 Amendment might have a legitimate purpose, as well as any other conceivable state purpose that might in hindsight be concocted, when the actual purpose was known.

In its precedents, this Court has not accepted a party's assertion of a theoretical legislative purpose when an examination of the legislative history and scheme establishes that the asserted purpose could not have been the actual goal of the legislation. *See Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (concluding that the legislature did not have the asserted purpose in mind prior to enactment of the legislation); *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974) (holding that the asserted purpose for a provision within the Social Security Act legislation could not be the actual purpose of the legislation as it did not serve the purposes of the Act as a whole); *Moreno*, 413 U.S. at 536-37 (holding that the actual purpose of legislation, as revealed in the legislative history, was not legitimate and rejecting a government asserted hypothetical

purpose for the legislation); *Wiesenfeld*, 420 U.S. at 648 (concluding that an asserted hypothetical purpose for legislation could not cure a violation of the Equal Protection Clause, because the statutory scheme and legislative history demonstrated that the asserted purpose was not the actual purpose of the legislation). The theoretical legislative purpose asserted by the Michigan Supreme Court in these circumstances should be no more acceptable.[8]

Given the undisputed findings of the two lower Courts regarding the actual purpose of the Legislature, the Michigan Supreme Court erred when it attempted to substitute a *theoretical* purpose for the *actual* purpose of 1988 Amendment. This is an important federal question; the error of the Michigan Supreme Court could recur because other states might be encouraged to enact similar legislation to that of Michigan for constitutionally impermissible purposes.

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[8] Indeed, Justice Kelly criticized the majority's theorizing on the ground that "[i]t reduces the test for evaluating the constitutionality of a classification to no more than abstract judicial imaginings with little or no apparent basis in fact." *TIG*, 629 N.W.2d at 411.

C.

The Purpose the Michigan Supreme Court Conceived in This Case Could Not Logically be a Legitimate Purpose for the 1988 Amendment

The purpose that the Michigan Supreme Court bestowed on the 1988 Amendment was based on the erroneous assumption that insurers doing business in Michigan are not exposed to the risk of loss in respect of insureds whose coverage is placed through the insurance facilities involved in this case. Specifically, the Michigan Supreme Court stated: "Because high risk or otherwise uninsurable insureds are provided for outside the normal insurance market, insurers doing business in Michigan need not bear the risks of insuring them, at least arguably benefitting such insurers." *TIG*, 629 N.W.2d at 408.

As the Michigan Supreme Court noted, the insurance facilities involved here were established so that certain basic insurance coverages would be available to high-risk Michigan residents who would be unable to procure the insurance through ordinary means. *TIG*, 629 N.W.2d at 408. Similar insurance facilities are common throughout the United States and tend to be marked by large deficits given their concentration of high-risk insureds. 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 1:27, 2:35 (3d ed. 1995). These facilities sometimes are referred to

as "shared" market facilities, because their underwriting losses are shared by all insurers in the state that write the type of insurance the facility provides. 1 *Id.* § 2:35; *see also* MICH. COMP. LAWS ANN. § 500.2932(1) (West 1983); MICH. COMP. LAWS ANN. § 500.3330(1)(c) (West 1983). Thus, contrary to the Michigan Supreme Court's assumption, insurers doing business in Michigan ultimately *do* "bear the risks of insuring" Michigan residents who must go through these facilities for insurance coverage.

To the extent it could be argued that insurers doing business in Michigan benefit from any of the insurance facilities at issue, the Michigan Supreme Court's conclusion that "it is at least debatable that excluding payments to such facilities from Michigan's retaliatory tax burden would encourage other states to establish such facilities" is nonsense. The Michigan Supreme Court reasoned as follows:

> Indeed, if another state had facilities and associations that paralleled the facilities and associations mentioned in [section 500.134(6)], then any retaliatory tax that insurers from the other state may owe Michigan would not be affected by [the 1988 Amendment] at all."

TIG, 629 N.W.2d at 408. Put in context, it appears that the Michigan Supreme Court

intended to say that, if before the 1988 Amendment a state did not have in place an insurance facility similar to one of the covered insurance facilities, then the 1988 Amendment would allow the state's legislature to consider establishing such a facility without fear that such legislative action could cause its domestic insurers to incur a retaliatory tax in Michigan equal to the assessments the new insurance facility imposed.

What the Michigan Supreme Court failed to recognize is that, if another state decided to establish insurance facilities parallel to the ones in Michigan, then it could have done so even before the 1988 Amendment undeterred by a concern that insurers from that state might owe Michigan additional retaliatory tax, provided that the assessments of the new facilities in that other state did not exceed the assessments imposed by the parallel Michigan insurance facilities. In fact, before the 1988 Amendment many other states already had one or more insurance facilities like those here involved, apparently undeterred by Michigan's longstanding treatment of the assessments of the covered insurance facilities as burdens for purposes of the Michigan retaliatory tax. 1 COUCH ON INSURANCE § 1.27. It is nonsense to imagine that the removal of assessments levied by the covered insurance facilities could encourage other states to establish the same or similar facilities for their residents.

II.

THE MICHIGAN SUPREME COURT ERRED IN CONCLUDING THAT, AFTER THE 1988 AMENDMENT, THE RETALIATORY TAX STATUTE CONTINUED TO ACHIEVE ITS STATED PURPOSE

The Michigan retaliatory tax statute incorporates a statement of legislative purpose in subsection (2), as follows: "The purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes." MICH. COMP. LAWS ANN. § 500.476a(2). For this purpose, the determination of whether another state imposes "discriminatory or excessive taxes" requires a comparison of the aggregate burdens that the other state imposes on Michigan insurers with the aggregate burdens Michigan imposes on insurers domiciled in that other state. *See Western & Southern*, 451 U.S. at 668-69. As described in Michigan's retaliatory tax law, aggregate burdens encompass any requirement that an insurer make payments to a state for "taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or any special burden or other burden."

In the 1988 Amendment, the Michigan Legislature selected six Michigan insurance facilities that it had to know generally imposed

higher assessments than those imposed by similar insurance facilities in other states, and it removed those insurance facilities from the Michigan retaliatory tax calculation. Indeed, the Michigan DOT calculated that the selective modification of the Michigan retaliatory tax calculation would raise between $10 million and $20 million in new 1988 tax revenues from foreign insurers doing business in Michigan. Through this action, the Michigan Legislature converted the Michigan retaliatory tax from a tool designed to induce other states to lower the aggregate burdens on Michigan insurers in order to spare their domestic insurers the cost of Michigan retaliatory tax to a device designed to raise taxes at the expense of foreign insurers.

The Michigan Supreme Court simply sidestepped this fundamental defect in the 1988 Amendment. The Court stated as follows:

> [T]he selective imposition of the [Michigan retaliatory] tax on only those insurers incorporated in states that tax Michigan insurers more heavily than Michigan taxes them indicates that the purpose of the legislation is to pressure those states to relieve the tax burden on Michigan insurers doing business in those states. . . . Even with the change in the method of calculation of the burden of Michigan's retaliatory tax,

> the tax remains rationally related to this legitimate purpose, and plaintiffs cannot prevail.

TIG, 629 N.W.2d at 408. This completely ignores the fact that the assessments the Michigan Legislature removed from the Michigan retaliatory tax formula had long been treated by Michigan as burdens. *TIG*, 602 N.W.2d at 842; *see also* Inclusion of Hypothetical Payments to Home State Guaranty Funds to Compute State of Incorporation Basis, Declaratory Ruling 89-10706-M, MICHIGAN INSURANCE BULLETINS (NILS) at R-65 (Nov. 30, 1989) (incorporating a ruling by the Michigan Attorney General holding that state-mandated assessments imposed by insurance facilities were burdens for purposes of the Michigan retaliatory tax calculation). The Michigan Legislature did not remove the assessments based on any consideration of whether its actions were necessary in order to ensure that the Michigan retaliatory tax achieved its stated purpose of equalizing burdens; it did so for the purpose of raising revenues from foreign

insurers as the Michigan Court of Appeals found.[9] *TIG*, 602 N.W.2d at 846.

By allowing the Michigan Legislature to cherry pick the assessments of state-mandated insurance facilities it chooses to treat as burdens, the Michigan Supreme Court condoned blatant manipulation of the Michigan retaliatory tax statute at the expense of foreign insurers. Such discriminatory treatment of TIG and other foreign insurers is clearly contrary to the concepts underlying the Equal Protection Clause. *See, e.g., Western & Southern*, 451 U.S. at 667-68; *Moreno*, 413 U.S. at 534-35; *see also TIG*, 602 N.W.2d at 846-47.

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[9] The fact that the Michigan Supreme Court observed in passing that there are states that do not treat certain insurance facility assessments as burdens for purposes of their retaliatory tax calculations cannot cure the Michigan Legislature's revenue-driven change in its longstanding treatment of assessments the insurance facilities here involved imposed on insurance companies doing business in Michigan. *TIG*, 629 N.W.2d at 408, n.2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: October 1, 2001

Respectfully submitted,

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CONSTITUTION

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SUPREME COURT OF MICHIGAN

No. 115915, No. 115916

TIG INSURANCE COMPANY, INC.,
Appellee

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Appellant

TIG PREMIER INSURANCE COMPANY, INC.,
Appellee

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Appellant

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629 N.W.2d 402

March 6, 2001, Argued
July 3, 2001, Decided
July 3, 2001, Filed

JUDGES: BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, YOUNG, and MARKMAN, JJ., concurred with CAVANAGH, J. KELLY, J. (concurring).

OPINION:

CAVANAGH, J.

These consolidated cases require us to decide whether a 1988 amendment of the Michigan Insurance Code's retaliatory tax, MCL 500.476a, deprived plaintiffs TIG Insurance Company and TIG Premier Insurance Company of equal protection of the laws under US Const, Am XIV and Const 1963, art 1, § 2, or violated the Uniformity of Taxation Clause of Const 1963, art 9, § 3. Absent an imposition on a fundamental right or a suspect class, tax legislation is reviewed to determine whether its classifications bear a rational relation to a legitimate state purpose. We conclude that the 1988 amendments of the retaliatory tax, which changed the tax calculation, are rationally related to the legitimate state purpose of promoting the interstate business of domestic insurers, the same legitimate purpose behind the retaliatory tax itself. Thus, the amendments of the retaliatory tax do not violate equal protection, and also do not violate the

Uniformity of Taxation Clause. Accordingly, the judgment of the Court of Appeals is reversed.

I.

This case involves the retaliatory tax that Michigan imposes on foreign insurers doing business in Michigan. Under the retaliatory tax, when an insurer's state of incorporation imposes a larger aggregate tax burden on a Michigan insurer doing business in that state than Michigan imposes on a company from that state doing business in Michigan, the foreign insurer must pay Michigan a tax equal to the difference in the aggregate tax burdens. See MCL 500.476a. Thus, to compute the retaliatory tax due from a foreign insurer, if any, Michigan tallies all the taxes, fines, penalties, and other burdens it otherwise imposes on the foreign insurer doing business in Michigan. Michigan then tallies the burden a hypothetical Michigan insurer would pay to that insurer's home state were the hypothetical Michigan insurer doing the same amount of business there. If the other state's total burden on the hypothetical Michigan insurer doing the same amount of business in that state would be larger than the burden Michigan imposed on the foreign insurer, the actual burden Michigan imposes is subtracted from the other state's burden on the hypothetical insurer, and the difference is the retaliatory tax the foreign insurer owes Michigan. These taxes have been common in insurance taxation since the

nineteenth century, see *Western & Southern Life Ins Co v State Bd of Equalization*, 451 U.S. 648, 668; 101 S. Ct. 2070; 68 L. Ed. 2d 514 (1981), and Michigan has had a form of a retaliatory tax since 1871. See 1871 PA 80, § 4 (adding what was then § 28 to the insurance code).

Until 1987, the retaliatory tax was one of two taxes imposed on foreign insurers. The other was the premiums tax, MCL 500.440, repealed by 1987 PA 261, which taxed a percentage of the insurers' business. However, in 1987, the Court of Appeals held that the premiums tax violated equal protection, and struck it as unconstitutional. See *Penn Mut Life Ins Co v Dep't of Licensing & Reg*, 162 Mich. App. 123, 130-133; 412 N.W.2d 668 (1987). After the Court of Appeals decision in *Penn Mutual*, which was not appealed to this Court, the Legislature revised the Michigan Insurance Code tax provisions by repealing the premiums tax, subjecting foreign insurers instead to the Single Business Tax, MCL 208.1 *et seq.*, and repealing and reenacting the retaliatory tax. See 1987 PA 261, 262. The new retaliatory tax, MCL 500.476a, mirrored the prior retaliatory tax. However, the revision added subsection (2), stating that "[T]he purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes."

In 1988, actual revenue from insurance taxes was below the level of projected revenue the

Legislature had relied upon in enacting 1987 PA 261 and 262. One of the reasons that revenue was lower than expected was that foreign insurers were including assessments paid to private insurance associations and facilities, such as the Worker's Compensation Placement Facility, among their Michigan burdens when calculating their retaliatory taxes. When these assessments were included in the foreign insurers' Michigan burden, their Michigan burden grew larger, and any differences between the Michigan burden and the burden the insurers' home states imposed shrank. The result was less retaliatory tax revenue.

After these facts were clear, the Legislature enacted 1988 PA 349. This provision did not affect the retaliatory tax's scope. Instead, it only changed the method of calculating the tax by providing that payments to private insurance associations and facilities are not counted as part of the Michigan burden when calculating retaliatory taxes. The resulting statute provides:

> (5) Any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a calculation under section 476a, and any premium or assessment paid to an

association or facility shall not be included in determining the aggregate amount a foreign insurer pays to the commissioner under section 476a.

(6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a non-profit organization of insurer members, including, but not limited to, the following:

(a) The Michigan worker's compensation placement facility created under [MCL 500.2301 *et seq.*]

(b) The Michigan basic property insurance association created under [MCL 500.2901 *et seq.*]

(c) The catastrophic claims association created under [MCL 500.3101 *et seq.*]

(d) The Michigan automobile insurance placement facility created under [MCL 500.3301 *et seq.*]

(e) The Michigan life and health insurance placement facility created under [MCL 500.7701 *et seq.*]

> (f) The property and casualty guaranty association created under [MCL 500.7901 *et seq.*] [MCL 500.134(5), (6).][1]

Hence, payments to these and other similar facilities are not part of the Michigan burden on foreign insurers, and such payments required by other states cannot be considered part of those states' burden when calculating retaliatory taxes.

The dispute in this case originally involved plaintiffs' retaliatory tax returns for 1990, 1991, and 1996. In those years, plaintiffs had made payments to the Worker's Compensation Placement Facility, the Basic Property Insurance Association, and the Automobile Insurance Placement Facility. Subsections 134(5) and (6), however, required plaintiffs to exclude those payments from their Michigan burdens when calculating the retaliatory tax they owed. Plaintiffs initially excluded these payments from their Michigan burden and fully paid their retaliatory tax for each year. Later, though, they filed amended returns that included these payments in their Michigan burdens, claiming that requiring them to exclude the payments violated the Equal Protection Clauses of the state and federal constitutions, as well as the

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[1] The Michigan Assigned Claims Facility created under MCL 500.3171 was subsequently added to the statute as subsection 6(g). See 1990 PA 256.

Uniformity of Taxation Clause of the Michigan Constitution. Plaintiffs, therefore, sought a refund of the alleged unconstitutional overcharge. Defendant, however, denied refunds for all three years.

Plaintiffs appealed the denial of refunds to the Michigan Court of Claims, which consolidated their cases. The Court of Claims held that MCL 500.134(5) violates equal protection because it was enacted to raise revenue rather than to deter other states from imposing discriminatory or excessive taxes on Michigan insurers doing business in those other states. Also, the court held that plaintiffs' 1990 and 1991 claims were time-barred by MCL 205.27a(6). The court, therefore, ordered defendant to pay plaintiffs refunds consistent with their amended 1996 retaliatory tax returns.

Both parties appealed, and the Court of Appeals affirmed. That Court believed that when the Legislature revised the retaliatory tax in 1987, the Legislature did not intend to change the definition of "burden," and later did so only because revenues did not meet expectations. Thus, the Court concluded that equal protection was violated because it was "abundantly clear that 1988 PA 349 was enacted as a stop-gap measure to raise funds in response to a projected shortfall in insurance tax revenues. This is not a valid reason for discriminating against foreign insurers." 237 Mich. App. 219, 230; 602 N.W.2d

839 (1999). The Court of Appeals also affirmed the Court of Claims conclusion that plaintiffs' 1990 and 1991 claims were time-barred, leaving plaintiffs with a judgment for refunds for 1996. Defendant appealed the Court of Appeals conclusion that 1988 PA 349 violates equal protection, we granted leave, 463 Mich. 905, (2000), and we now reverse.

II.

The United States Supreme Court addressed the constitutionality of retaliatory taxes in *Western & Southern Life Ins Co v State Bd of Equalization, supra.* In that case, California had adopted a retaliatory tax similar to Michigan's, and an Ohio corporation challenged its constitutionality. The Supreme Court noted that several provisions of the constitution generally limit states' ability to regulate foreign corporations, but under the Commerce Clause, US Const, art 1, § 8, Congress has delegated insurance regulation to the states, see 15 USC 1011 *et seq.*, and the privileges and immunities clause, US Const, art 4, § 2, does not apply to corporations, see *Hemphill v Orloff*, 277 U.S. 537, 548-550; 48 S. Ct. 577; 72 L. Ed. 978 (1928), leaving only the Equal Protection Clause as a basis for the challenge. *Western & Southern* at 656. After reviewing its prior decisions, the Court concluded that a state's authority to treat foreign corporations differently than domestic corporations should be upheld if the different

treatment bears a rational relation to a legitimate state purpose. California's retaliatory tax, the Court held, had the legitimate state purpose of promoting domestic insurers in other states by discouraging other states from excessively taxing domestic insurers. The tax was reasonably related to that purpose because the California Legislature could have believed that the tax would "induce other States to lower the burdens on California insurers in order to spare their domestic insurers the cost of the retaliatory tax in California." *Id.* at 672. Thus, the Supreme Court confirmed that retaliatory taxes do not violate equal protection, and do not violate the constitution.

In light of *Western & Southern*, the general constitutionality of Michigan's retaliatory tax is clear. The question in this case surrounds 1988 PA 349. That amendment of Michigan's retaliatory tax did not change the classification plan drawn by Michigan's retaliatory tax. Rather, it only changed the calculation method of a foreign insurer's Michigan burden by providing that payments to certain private insurance associations and facilities are not included in the burden. Whether the amendment violates the state or federal Equal Protection Clauses, which are coextensive, see *Armco Steel v Dep't of Treasury*, 419 Mich. 582, 591; 358 N.W.2d 839 (1984), or Michigan's Uniformity of Taxation Clause, which is not discernably different from equal protection in cases involving tax statutes,

see *id.* at 592, presents a question of law. We review questions of law de novo. See *Tolksdorf v Griffith*, 464 Mich. 1; ___ N.W.2d ___ (2001).

As *Western & Southern* declared, rational basis review applies in challenges of retaliatory taxes. "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v Coleman*, 463 Mich. 248, 260; 615 N.W.2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.* at 259-260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich. 566, 576; 24 N.W.2d 213 (1946). Thus, to have the legislation stricken, the challenger would have to show that the legislation is based "solely on reasons totally unrelated to the pursuit of the State's goals," *Clements v Fashing*, 457 U.S. 957, 963; 102 S. Ct. 2836; 73 L. Ed. 2d 508 (1982), or, in other words, the challenger must "negative every conceivable basis which might support" the legislation. *Lehnhauser v Lake Shore Auto Parts Co*, 410 U.S. 356, 364; 93 S. Ct. 1001; 35 L. Ed. 2d 351 (1973).

In this case, plaintiffs claim that Michigan has exceeded its authority to treat foreign corporations differently than domestic corporations because the different treatment does not bear a rational relation to a legitimate state purpose. This is so, plaintiffs claim, because 1988 PA 349, which excluded certain payments from plaintiffs' Michigan burdens for retaliatory tax calculations, converted the retaliatory tax from a tax intended to discourage other states from imposing excessive levels of taxation on Michigan insurers to a tax designed to raise revenue at the expense of foreign insurers. Thus, plaintiffs argue that the 1988 amendment of the retaliatory tax cannot be constitutional.

Initially, we emphasize that Michigan's retaliatory tax has never, either before or after the 1988 amendment, treated foreign insurers as a single class. Rather, the subset of foreign insurers that must pay Michigan any retaliatory tax is actually determined by the laws of other states. Specifically, the subset is determined by the laws of those states that impose more onerous burdens on Michigan insurers than Michigan imposes on insurers from those states. The Supreme Court made this same observation about the retaliatory tax it held constitutionally permissible in *Western & Southern*, stating that "[t]he retaliatory tax is not imposed on foreign corporations *qua* foreign corporations, as would be expected were the purpose of the tax to raise revenue from noncitizens; rather, it is imposed only on

corporations whose home States impose more onerous burdens on California insurers than California otherwise would impose on those corporations." *Western & Southern* at 670, n 23.

Absent a change in the legislative classification, we cannot agree with plaintiffs' claim that a 1988 amendment converted the retaliatory tax into a tax designed to raise revenue from foreign insurers. Rather, the selective imposition of the tax on only those insurers incorporated in states that tax Michigan insurers more heavily than Michigan taxes them indicates that the purpose of the legislation is to pressure those states to relieve the tax burden on Michigan insurers doing business in those states. This is the precise purpose the Legislature stated for adopting the retaliatory tax, see MCL 500.476a(2), and the same purpose the Supreme Court found "not difficult to discern" in *Western & Southern* at 668. Further, in *Western & Southern*, the Supreme Court held, without discussing the means a state may adopt to calculate the retaliatory tax, that states are reasonable to suppose that a retaliatory tax will induce other states to lower their insurance tax rates. *Id.* at 672. Even with the change in the method of calculation of the burden of Michigan's retaliatory tax, the tax remains rationally related to this legitimate purpose, and plaintiffs cannot prevail.

However, even presuming that 1988 PA 349 can somehow be viewed separately from

Michigan's retaliatory tax structure, the Legislature could have rationally decided to exclude payments to certain insurance associations and facilities from Michigan's retaliatory tax burden. The three facilities in this case, the Worker's Compensation Placement Facility, the Automobile Insurance Placement Facility, and the Basic Property Insurance Association, exist to provide insurance coverage to insureds that may be unable to "procure the insurance through ordinary methods." MCL 500.2301(a); see also MCL 500.3301(a) and MCL 500.2925 (describing eligibility for Basic Property Insurance). Because high risk or otherwise uninsurable insureds are provided for outside the normal insurance market, insurers doing business in Michigan need not bear the risks of insuring them, at least arguably benefitting such insurers. The Legislature could have believed that if it did not require payments to these facilities not to be excluded from the retaliatory tax burden, other states would not be discouraged from establishing similar facilities to grant the same benefit to insurers doing business in those states, including Michigan insurers. Indeed, if another state had facilities and associations that paralleled the facilities and associations mentioned in MCL 500.134, then any retaliatory tax that insurers from the other state may owe Michigan would not be affected by

1988 PA 349 at all.[2] Again, then, the Legislature could have had the permissible purpose of promoting domestic insurers abroad, the same purpose it stated in the retaliatory tax legislation. Because it is at least debatable that excluding payments to such facilities from Michigan's retaliatory tax burden would encourage other states to establish such facilities, the 1988 amendment is rationally related to a legitimate purpose, and is not constitutionally infirm.

Plaintiffs maintain, however, that the 1988 amendment conflicts with the Supreme Court's decision in *Western & Southern* because it was designed entirely "to generate revenue at the expense of out-of-state insurers." As we have explained, the tax does not affect foreign insurers as a single class. Further, though, plaintiffs overlook the presumption of constitutionality, and cannot account for the legitimate bases of the legislation. Instead, plaintiffs seek one possible illegitimate basis for the legislation. Plaintiffs' approach conflicts with Supreme Court precedent because they have not shown that the legislation rests "solely on reasons totally unrelated to the pursuit of the State's goals . . . ." *Clements* at 963. Because there is at least one conceivable rational basis that might support the legislation,

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[2] We note that several other states similarly exclude payments to special associations and facilities from their retaliatory tax burdens. See, e.g., Conn Gen Stat, 12-211; 215 Ill Comp Stat, 5/444.1(2).

plaintiffs have not "negative[d] every conceivable basis which might support" it, and cannot prevail. *Lehnhauser* at 364.

In response, plaintiffs have argued that they need not negate every conceivable basis for the legislation. This is because, they claim, in equal protection cases, the Court "need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v Wiesenfeld*, 420 U.S. 636, 648, n 16; 95 S. Ct. 1225; 43 L. Ed. 2d 514 (1975). However, as discussed, an examination of the legislative scheme in this case indicates that the asserted purpose could well have been the goal of the legislation. For plaintiffs to prevail, they must negate every conceivable basis of the legislation. Because plaintiffs have not, they cannot prevail.

Finally, plaintiffs attempt to distinguish this case from *Western & Southern* by arguing that the tax revenue generated in that case was "relatively modest," see *Western & Southern* at 669, but under the amendment, Michigan's retaliatory tax immodestly generates over a third of Michigan's insurance tax revenue. As a preliminary point, the fact that the retaliatory tax raises revenue does not prove that raising revenue was the state's goal in adopting the tax. On rational basis review, this Court only

considers whether the legislation is reasonably related to a legitimate purpose, and does not test for "some inequity when [the legislation is] put into practice." *Crego* at 260. But further, though the *Western & Southern* Court's statement strikes us simply as an observation and not, as plaintiffs contend, as the linchpin of the Court's analysis, even if it is an important point, this case is distinguishable. Michigan's retaliatory tax may generate a third of Michigan's insurance tax revenue, but the Supreme Court did not state that the retaliatory tax it approved raised a relatively modest amount of insurance tax revenue, just that it raised a modest amount of revenue. The joint appendix shows that although Michigan raised approximately $67 million annually in retaliatory taxes for the years 1991 through 1995, for example, when compared with Michigan's overall tax revenue for that period, which ranged from $10.5 billion to $17.2 billion annually, see Michigan Dep't of Treasury, Annual Report of the State Treasurer (1996), p 25, retaliatory tax revenue is certainly "relatively modest." Thus, even if retaliatory tax revenue must be modest, as compared with Michigan's overall tax revenue, retaliatory tax revenue is not immodestly large, and plaintiffs again have not shown Michigan's retaliatory tax or 1998 PA 349 to be unconstitutional. Again, plaintiffs cannot prevail.

III.

In conclusion, neither Michigan's retaliatory tax nor the 1988 amendment of that tax violates the state or federal constitutions, which are coextensive in their equal protection provisions. The retaliatory tax, and the amendments of it, are rationally related to the legitimate governmental purpose of promoting Michigan insurers in other states. Because the tax and its amendment do not violate equal protection, they also do not violate the Michigan Constitution's Uniformity of Taxation Clause, which is not discernibly different from the Equal Protection Clause when the constitutionality of a tax statute is being reviewed. Plaintiffs have not carried their considerable burden, and the judgment of the Court of Appeals is reversed.

CORRIGAN, C.J., and WEAVER, TAYLOR, YOUNG, and MARKMAN, JJ., concurred with CAVANAGH, J.

CONCUR: KELLY, J. (concurring).

While I agree with the conclusion reached by the majority, I write separately to state my disagreement with certain of the reasoning it employs. Whereas the majority articulates what would be legitimate purposes for adoption of the amendment, it completely ignores the evidence presented by plaintiffs. This evidence throws into doubt whether the Legislature's actual purpose

was legitimate, as it has to be in order to conform with precedent from the United States Supreme Court.

The states cannot impose more onerous taxes or other burdens on foreign corporations than on domestic corporations, unless they bear a rational relation to a legitimate state purpose. *Western & Southern Life Ins Co v State Bd of Equalization*, 451 U.S. 648, 667-668; 101 S. Ct. 2070; 68 L. Ed. 2d 514 (1981). A retaliatory tax act, like that in question, makes of foreign corporations a special classification of taxpayers.

In evaluating the constitutionality of a challenged classification, we must consider two separate issues. First, whether the statute in question advances a legitimate purpose and, second, whether, in passing it, the Legislature reasonably could have believed that the classification would promote that purpose. *Id.* at 668. Only after a legitimate purpose is ascertained does a rational relationship between the classification and purpose become relevant. See *Metropolitan Life Ins Co v Ward*, 470 U.S. 869, 881; 105 S. Ct. 1676; 84 L. Ed. 2d 751 (1985).

While this two-step inquiry does not require that the Legislature articulate its purpose in forming the challenged classification, it does require that a conceivable or reasonable purpose exist. *Nordlinger v Hahn*, 505 U.S. 1, 15; 112 S. Ct. 2326; 120 L. Ed. 2d 1 (1992). The United

States Supreme Court rejected the proposition that promotion of domestic industry is always a legitimate purpose, reasoning that it "eviscerate[s] the Equal Protection Clause." *Metropolitan Life, supra* at 882. The Court stated that, if this proposition were accepted, any discriminatory tax would be upheld if it could be shown that it was reasonably "intended to benefit domestic business." *Id.*

This appears to be the rationale used by the majority in upholding the amendment at issue. The majority does not discuss the evidence presented by plaintiffs or how this evidence is insufficient to overcome the presumption of the amendment's constitutionality. Rather, it concludes that the purpose of the amendment may have been the same as the purpose stated in the underlying retaliatory tax act. That was to promote domestic insurers abroad, a permissible purpose.

It seems unlikely that was the Legislature's purpose because, as stated by the majority, the amendment appeared when the Legislature discovered that retaliatory tax revenue was far less than expected. See slip op at p 4. If sufficient evidence had been presented by plaintiffs that the purpose was to cover the shortfall, the legitimate purposes opined by the majority would not necessarily carry the day.

Therefore, this Court should state explicitly that the rational basis test, while deferential, does not ensure that all taxation legislation will pass constitutional muster. In this case, plaintiffs presented evidence that employees from the Department of Management and Budget and the Department of Treasury advocated the amendment for a purpose that was impermissible. This evidence does not overcome the presumption of constitutionality because it does not explicitly demonstrate that the "classification is a hostile and oppressive discrimination." *Lehnhausen v Lake Shore Auto Parts Co*, 410 U.S. 356, 364; 93 S. Ct. 1001; 35 L. Ed. 2d 351 (1973). But this is not to say that, in another case, the burden in overcoming the presumption of constitutionality cannot be met.

In failing to address this fact, it appears that the majority would uphold any classification, regardless of evidence demonstrating an actual improper purpose for it. The majority's scant treatment of the evidence presented seems to eliminate any possibility of future litigants demonstrating an improper purpose for a challenged classification. It reduces the test for evaluating the constitutionality of a classification to no more than abstract judicial imaginings with little or no apparent basis in fact. Moreover, it elevates a plaintiff's burden of proof to insurmountable heights. Such reasoning is contrary to the United States Supreme Court

precedent of *Western & Southern Life* and *Metropolitan Life*.

A-23

COURT OF APPEALS OF MICHIGAN

No. 206999, No. 207443

TIG INSURANCE COMPANY, INC.,
Plaintiff-Appellant/ Cross-Appellee,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee/ Cross-Appellant

TIG PREMIER INSURANCE COMPANY INC.,
Plaintiff-Appellant/ Cross-Appellee,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee/ Cross-Appellant

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602 N.W.2d 839

August 17, 1999, Decided

JUDGES: Neff, P.J., and Hood and Murphy, JJ.

OPINION:

PER CURIAM.

In these consolidated cases involving the 1988 amendments of the retaliatory tax provision of the Michigan Insurance Code, MCL 500.134(5) and (6); MSA 24.1134(5) and (6), defendant Department of Treasury cross appeals the Court of Claims determination that the amendments are unconstitutional on equal protection grounds. Plaintiffs TIG Insurance Company, Inc., and TIG Premier Insurance Company, Inc., (hereafter collectively referred to as TIG) appeal the Court of Claims determination that TIG's claims for tax years 1990 and 1991 were barred by the ninety-day statute of limitations contained in MCL 205.27a(6); MSA 7.657(27a)(6). We affirm.

I.

Like nearly every other state, Michigan imposes a retaliatory tax[1] on foreign insurance

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[1] Michigan's retaliatory tax is currently codified at MCL 500.476a(1); MSA 24.1476(1)(1):

> Whenever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties,

(continued...)

companies "equal to that imposed on Michigan companies doing business in those states where the aggregate tax burden on Michigan companies doing business in those states exceeds the burden on companies of those states doing business in Michigan." *Coates v Attorney General*, 120 Mich. App. 816, 826-827; 328 N.W.2d 113 (1982). In other words, whenever a Michigan insurer is required to pay taxes, fines, penalties, or other burdens as a requirement of selling insurance in another state, those burdens are compared to the burdens that Michigan law

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[1](...continued)

certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country.

imposes on foreign insurers. If the foreign state's burdens on Michigan insurers are greater than the burdens Michigan generally imposes on foreign insurers, then insurers from that state writing insurance in Michigan are subject to a retaliatory tax, equal to the difference in the burdens.

Before 1987, foreign insurers were subject to either a premiums tax, MCL 500.440; MSA 24.1440 (repealed), or a retaliatory tax, MCL 500.476; MSA 24.1476 (repealed). The premiums tax was computed as two to three percent of gross premiums collected, depending on the type of insurance sold, and was not imposed on domestic insurers. In contrast, domestic insurers were required to pay a single business tax (SBT), MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*, which is a value-added tax assessed for the privilege of doing business in Michigan. *Cowen v Dep't of Treasury*, 204 Mich. App. 428, 432; 516 N.W.2d 511 (1994). This bifurcated tax structure led to vastly different taxation between foreign and domestic insurers.[2]

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[2] For example, the department represents that in 1985, domestic insurers wrote thirty-two percent of the insurance business in Michigan, while foreign insurers paid more than ninety-nine percent of insurance taxes ($142 million of Michigan's $143 million insurance tax revenue).

In 1987, this Court held that the premiums tax imposed on foreign insurers violated the Equal Protection Clause because it was not rationally related to the state interest advanced, that is, making insurance coverage more available to Michigan residents. *Penn Mut Life Ins Co v Dep't of Licensing & Regulation*, 162 Mich. App. 123, 129-130; 412 N.W.2d 668 (1987). In response, the Legislature enacted 1987 PA 261 and 1987 PA 262, repealing the premiums tax, revising the existing retaliatory tax, and amending the SBT to apply to foreign as well as domestic insurers.

In early 1988, the department determined that the actual insurance company tax revenue for that year was far behind its earlier projections. It appears that one of the reasons for the shortfall was the method used to calculate projected revenues from retaliatory tax assessments; the department, along with the Department of Management and Budget, had erroneously excluded from its projected retaliatory tax computations payments to certain facilities formed as nonprofit organizations of insurers.[3] Such third-party assessments were, until that time, generally included as a "burden" of conducting business in Michigan. See OAG, 1975-1976, No 4874, p 85 (May 22, 1975).

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[3] These facilities are funded by the insurance industry itself, with the goal of spreading the risk of certain coverage over a pool of insurers writing similar policies.

Excluding these payments from the computation of projected revenue resulted in an overstatement of the amount of expected revenue from the new retaliatory tax scheme. When actual revenues were lower than projected because of the error involving the definition of "burden", the Legislature enacted 1988 PA 349, revising the retaliatory tax structure in an attempt to generate increased insurance tax revenue.[4]

The resultant statutory provisions, MCL 500.134(5) and (6); MSA 24.1134(5) and (6), provide that payments to the enumerated facilities may not be considered "burdens or special burdens" for purposes of computing retaliatory tax liability:

> (5) Any premium or assessment levied by an association or facility, or

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[4] We note that 1988 SB 707, the precursor to 1988 PA 349, was originally proposed in response to this Court's decision that the Catastrophic Claims Association was a state agency subject to the provisions of the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* *League General Ins Co v Catastrophic Claims Ass'n*, 165 Mich. App. 278; 418 N.W.2d 708 (1987), rev'd 435 Mich. 338; 458 N.W.2d 632 (1990). In addition to later amendments affecting the retaliatory tax, 1988 PA 349 expressly provided that the Catastrophic Claims Association and other third-party facilities were not state agencies and were not subject to the APA. The Supreme Court reversed this Court's decision in *League General*, 435 Mich. 338 at 351, 458 N.W.2d 632.

any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a calculation under section 476a, and any premium or assessment paid to an association or facility shall not be included in determining the aggregate amount a foreign insurer pays to the commissioner under section 476a.

(6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:

(a) The Michigan worker's compensation placement facility created under [MCL 500.2301 *et seq.*; MSA 24.12301 *et seq.*].

(b) The Michigan basic property insurance association created under [MCL 500.2901 *et seq.*; MSA 24.12901 *et seq.*].

(c) The catastrophic claims association created under [MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*].

(d) The Michigan automobile insurance placement facility created under [MCL 500.3301 *et seq.*; MSA 24.13301 *et seq.*].

(e) The Michigan life and health insurance guaranty association created under [MCL 500.7701 *et seq.*; MSA 24.17701 *et seq.*].

(f) The property and casualty guaranty association created under [MCL 500.7901 *et seq.*; MSA 24.17901 *et seq.*].[5]

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[5] A subsequent modification, 1990 PA 256, added subsection 6(g): "The assigned claims facility created under [MCL 500.3171; MSA 24.13171]." In an unrelated case, the Court of Claims held that 1990 PA 256 violated equal protection principles, because it was enacted for the sole purpose of raising revenue. *State Farm Fire & Casualty Co v Dep't of Treasury*, Court of Claims Docket Nos. 91-13463-CM and 92-14246-CM. The department did not challenge this ruling, and in fact concedes that TIG is entitled to a retaliatory tax refund for payments made to the Assigned Claims Facility. The department maintains, however, that payments made to the other facilities listed in MCL 500.134(6); MSA 24.1134(6) do not constitute Michigan

(continued...)

Thus, payments made to these facilities may not be considered burdens of conducting business in Michigan, and payments made to similar facilities in other states may not be considered burdens of conducting business in those states. The practical effect of the amendment is to increase the difference between the "burdens" of Michigan and other states, thus increasing the amount of retaliatory tax paid by foreign insurance companies.

II.

The present case was tried on stipulated facts. Plaintiffs are insurance companies domiciled in California and licensed to do business in Michigan. As entities doing business in Michigan, they are subject to either the SBT, MCL 208.22f; MSA 7.558(22f); or the retaliatory tax, MCL 500.476a; MSA 24.1476(1), whichever is greater. MCL 500.476b; MSA 24.1476(2).

In 1990 and 1991, TIG filed timely tax returns for its SBT and retaliatory tax liabilities and paid the corresponding taxes in full. In 1995 and 1996, TIG filed amended retaliatory tax statements for tax years 1990 and 1991 respectively, this time including in its calculation

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[5](...continued)
"burdens."

of Michigan "burdens or special burdens" amounts paid to the Worker's Compensation Placement Facility, Basic Property Insurance Association, and Automobile Insurance Placement Facility. TIG also filed timely 1996 SBT and retaliatory tax returns and filed amended returns in 1997, using similar calculations and claiming a retaliatory tax refund for tax year 1996. The department denied all three refund requests.

Plaintiffs brought in the Court of Claims two actions against the department that were later consolidated. In its ruling, the Court of Claims held that MCL 500.134(5) and (6); MSA 24.1134(5) and (6) were unconstitutional on equal protection grounds. Specifically, the Court of Claims stated that the impetus for these sections was to raise revenue, rather than a desire to deter other states from discriminating against Michigan insurers. The Court of Claims further held that the ninety-day statute of limitations contained in MCL 205.27a(6); MSA 7.657(27a)(6) was constitutional and served to bar TIG's claims for tax years 1990 and 1991.

III.

In its cross appeal, the department argues that the Court of Claims erred in determining that the 1988 revisions to the retaliatory tax provisions violate the constitutional guarantee of

equal protection under the law.[6] We disagree.

A.

Equal protection under the law is guaranteed by both the United States and Michigan Constitutions. US Const, Am XIV; Const 1963, art 1, § 2. These constitutional provisions are coextensive and mandate that persons similarly situated be treated similarly. *Dowerk v Oxford Charter Twp*, 233 Mich. App. 62, 72-73; 592 N.W.2d 724 (1998). With respect to taxation, a state may not impose "more onerous

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[6] Indeed, the department argues that the disputed legislation does not discriminate against foreign insurers and that there is no need for an equal protection analysis at all. The department posits that all insurers are taxed equally through the SBT, and only where an insurer's home state imposes excessive burdens on Michigan insurers are the retaliatory-tax provisions implicated. Thus, the department contends, any difference merely reflects classifications adopted in other jurisdictions. The department would thus have this Court hold that Michigan is not responsible for adopting discriminatory classifications because other states have them as well.

It is without dispute that all insurers are subject to the Michigan SBT and that only foreign insurers are subject to the retaliatory tax. The retaliatory tax statute, on its face, clearly discriminates against foreign insurers by imposing separate tax treatment for insurers based on their state of incorporation. Therefore, despite the department's claim, equal protection analysis is appropriate.

taxes or other burdens" on foreign businesses than are imposed on domestic businesses unless the discrimination between foreign and domestic businesses bears a "rational relation to a legitimate state purpose." *Western & Southern Life Ins Co v State Bd of Equalization*, 451 U.S. 648, 668; 101 S. Ct. 2070; 68 L. Ed. 2d 514 (1981). To determine whether an equal protection violation exists, this Court must analyze all provisions of the challenged law, along with its policy and objective. *Frame v Nehls*, 452 Mich. 171, 183; 550 N.W.2d 739 (1996). This analysis begins with the presumption that the statute is constitutional, which is particularly strong in the case of tax legislation. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich. 400, 413; 488 N.W.2d 182 (1992).

B.

When it originally revised the retaliatory tax in 1987, the Legislature expressly provided that "the purpose of [the retaliatory tax] is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes." MCL 500.476a(2); MSA 24.1476(1)(2). This has been recognized by the United States Supreme Court as a legitimate state purpose. *Western & Southern Life Ins Co, supra* at 671. In the present case we must determine whether the legislation at issue, that is, the 1988 amendments that provided that payments to certain third-party

associations were to be excluded from the calculation of "burdens," were similarly enacted for this legitimate state purpose and whether they are rationally related to this purpose. 451 U.S. at 668; *Penn Mut Life Ins Co*, 162 Mich. App. at 129-130. It is here that the legislation fails to pass constitutional muster.

I.

The department maintains that the 1987 revisions to the retaliatory tax contemplated that payments to third-party facilities would not be considered Michigan burdens for purposes of retaliatory tax calculation and that, therefore, the exclusions contained in 1988 PA 349 merely clarified the law already in effect. We disagree.

The problem with the department's argument is that there is simply no evidence that the Legislature intended in 1987 to change its definition of "burden." The retaliatory tax established in 1987 examines payments made for "taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or any special burden or other burden." MCL 500.476a; MSA 24.1476(1). These are precisely the same payments examined by the previous retaliatory tax. MCL 500.476; MSA 24.1476 (repealed). Moreover, there is no evidence of discussions regarding whether other states have similar third-party associations and, if so, whether payments to these associations are excluded as a burden

when calculating that state's retaliatory tax.

To the contrary, it appears that it was the department's own mistaken belief that payments to third-party facilities were historically not considered "burdens" for retaliatory tax calculations that caused it to miscalculate projected retaliatory tax revenue for 1988.[7] This miscalculation and resultant projected decrease in insurance tax revenues led, in turn, to the Legislature's enactment of 1988 PA 349, which excluded payments to third-party facilities from the definition of "burden."

It is abundantly clear that 1988 PA 349 was enacted as a stop-gap measure to raise funds in response to a projected shortfall in insurance tax revenues. This is not a valid reason for discriminating against foreign insurers. *Western & Southern Life Ins Co, supra.*[8] For this reason,

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[7] The department acknowledges this in its brief, stating that it "had operated at all times during this process [of calculating budget projections for the 1987 and 1988 amendments] under the (apparently mistaken) belief that these facilities were not considered Michigan burdens for retaliatory tax purposes."

[8] We note that the California retaliatory tax at issue in *Western & Southern Life Ins Co, supra*, generated approximately one percent of total insurance tax revenue, and thus was "relatively modest." *Id.* at 669. Michigan's retaliatory tax in the years 1988-95 generated

(continued...)

we find unconstitutional the 1988 amendments of the retaliatory tax that exclude third-party assessments as a "burden" for purposes of computing the retaliatory tax.

2.

Because we find that the legislation at issue was not enacted for a legitimate state purpose, we need not reach the second inquiry in the equal protection analysis; that is, whether the legislation is rationally related to the purpose. *Id.* We address briefly, however, the department's argument that the 1988 amendments justifiably differentiate between those assessments paid to state entities and those paid to third-party associations.

We first note that the statute itself does not make this distinction. MCL 500.134(5); MSA 24.1134(5) excludes "any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this

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[8](...continued)
approximately thirty-three percent of total insurance tax revenue. Although we do not hold that the retaliatory tax must necessarily generate a "relatively modest" amount of revenue, we find that this statistic represents further evidence that the purpose of the 1988 amendments of Michigan's retaliatory tax was to generate revenue at the expense of foreign insurers.

state." "Association or facility" is further defined as "an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members." MCL 500.134(6); MSA 24.1134(6). The statute does not clarify what might be considered a "*similar* association or facility formed under a law in force outside this state." MCL 500.134(5); MSA 24.1134(5) (emphasis added). On its face, therefore, the statute provides that assessments made to nonprofit organizations of insurer members are not burdens, regardless of where those organizations are located.[9]

The only real distinction between the nonprofit organizations and state entities is the method by which the state retains control. For example, the Michigan Automobile Insurance Placement Facility is a nonprofit association of insurers with "control" over its funds. MCL 500.3301 *et seq.*; MSA 24.13301 *et seq.* However, it was established by the Legislature, and the funds it collects may only be used for the specific purpose of providing insurance coverage for high-

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[9] As the department notes, payments to other funds or entities consisting of insurer contributions are burdens, such as the Second Injury Fund, MCL 418.501; MSA 17.237(501), the Silicosis, Dust Disease, and Logging Industry Compensation Funds, *id.*, and the Safety Education and Training Fund, MCL 408.1055; MSA 17.50(55).

risk drivers otherwise unable to obtain insurance--a use mandated by the Legislature. MCL 500.3301; MSA 24.13301.

The distinction between assessments by state-*regulated* and state-*controlled* entities is fraught with danger of manipulation. Through the provisions of MCL 500.134(5) and (6); MSA 24.1134(5) and (6), another state may choose to establish an unlimited number of third-party organizations to fund virtually any project it wishes, thus placing onerous burdens on Michigan insurers and virtually guaranteeing that its own insurers avoid Michigan's retaliatory tax. Consequently, we find the distinction contained in the 1988 amendments is not rationally related to the retaliatory tax's stated purpose of promoting "the interstate business of domestic insurers." MCL 500.476a(2); MSA 24.1476(1)(2).

C.

The retaliatory tax itself was enacted for the legitimate state purpose of promoting interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive burdens. However, we find that the purpose of the 1988 amendments, which provide the method of calculating the tax and exclude from the definition of "burden" payments to third-party associations, was enacted to generate revenue at

the expense of foreign insurers. We further find that the exclusion of third-party assessments in the calculation of burdens for retaliatory tax purposes is not rationally related to the stated goal of promoting the interstate business of domestic insurers. For these reasons, we agree with the Court of Claims determination that MCL 500.134(5) and (6); MSA 24.1134(5) and (6) violate the Equal Protection Clauses of the United States and Michigan Constitutions.

IV.

The department next argues that 1988 PA 349 does not violate the Uniformity of Taxation Clause contained in Const 1963, art 9 § 3. As our Supreme Court has explained, "as a practical matter, in cases involving taxing statutes there is no discernible difference between the Equal Protection and Uniformity of Taxation Clauses." *Armco Steel Corp v Dep't of Treasury*, 419 Mich. 582, 592; 358 N.W.2d 839 (1984). Accordingly, for the reasons set forth above, the provisions of MCL 500.134(5) and (6); MSA 24.1134(5) and (6) violate the Uniformity of Taxation Clause. Const 1963, art 9, § 3.

V.

We now turn to TIG's challenge to the Court of Claims determination that its claims for a retaliatory tax refund for tax years 1990 and 1991 were barred by the ninety-day statute of

limitations. As a general rule, a taxpayer is permitted four years in which to claim a refund. MCL 205.27a(2); MSA 7.657(27a)(2). However, MCL 205.27a(6); MSA 7.657(27a)(6) treats differently those whose refund claims arose because a Michigan tax statute has been preempted by a constitutional provision or federal law:

> [A] claim for refund based upon the validity of a tax law based on the laws or the constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return.

On appeal, TIG argues that subsection 27a(6) is unconstitutional. However, this Court has recently held that subsection 27a(6) does not violate the Due Process or the Equal Protection Clauses of the United States or Michigan Constitutions. *American States Ins Co v Dep't of Treasury*, 220 Mich. App. 586; 560 N.W.2d 644 (1996). We find no reason, nor has TIG suggested any, to depart from the analysis and holding in that case.

TIG acknowledges that its 1990 and 1991 refund claims were not filed within the ninety days required by subsection 27a(6). Accordingly, the Court of Claims correctly held that TIG's

refund claims for these two years are barred by the statute of limitations.

Affirmed.

/s/ Janet T. Neff

/s/ Harold Hood

/s/ William B. Murphy

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

File No. 96-16428-CM
File No. 96-16429-CM

TIG INSURANCE COMPANY, INC.,
Plaintiff

v.

REVENUE DIVISION, DEPARTMENT
OF TREASURY, STATE OF MICHIGAN
Defendant

TIG PREMIUM INSURANCE COMPANY, INC.,
Plaintiff

v.

REVENUE DIVISION, DEPARTMENT
OF TREASURY, STATE OF MICHIGAN
Defendant

MOTION FOR SUMMARY DISPOSITION

Lansing, Michigan - Wednesday, October 1, 1997

JUDGE: The Honorable Michael G. Harrison, Circuit Court Judge

[oral argument omitted]

THE COURT: Thank you. Plaintiff's argue that summary disposition is appropriate pursuant to MCR 2.116(C)(10). A motion under this subrule tests whether there is a question of material fact for trial. The Court must inquire whether the type of record which may be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds may differ. The Court examines the facts in the light most favorable to the nonmoving party.

The moving party must support the motion with affidavits or other documentary evidence. The opposing party may not rest upon mere allegations or denials in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial.

Because this case involves only issues of law -- and I would insert with the concerted effort of counsel to enter into the stipulations that it did, for which I express my appreciation -- summary disposition is appropriate because no genuine issue of material fact exists for trial.

Plaintiff -- plaintiffs claim they are entitled to refunds for taxes paid for 1990, 1991, and 1996. Plaintiffs concede, however, that their claims regarding refunds for 1990 and '91 are barred by the ninety-day statute of limitations contained in MCL 205.27a, if that statute is itself constitutional.

The Court of Appeals, in American States Insurance Company versus Department of Treasury, 220 Michigan Appeals 586, 1996, held that the statute was in fact constitutional. Therefore, plaintiff's claims for 1990 and 1991 are barred. Accordingly, summary disposition is appropriate regarding those claims under MCR 2.116(I)(2).

With respect to their 1996 claim, plaintiffs allege that section 134(5) of the Insurance Code, MCL 500.134(5), violates equal protection and the uniformity of the tax laws.

The Michigan Supreme Court in Armco Steel Corporation versus Department of Treasury, 419 Michigan 582, 1984, quoted the United States Supreme Court's decision in Allied Stores of Ohio versus Bowers, 358 U.S. 522, at 527, 1959, for the proposition that:

> "There is a point beyond which the state cannot go without violating the Equal Protection Clause. The state must proceed upon a rational

basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." This is quoted from Armco at 591.

"Similarly, under the Uniformity of Taxation Clause of the Michigan Constitution, the controlling principle is one of equal treatment of similarly situated taxpayers. As a practical matter, in cases involving taxing statutes there are no discernible difference between the Equal Protection and Uniformity of Taxation Clauses. Some rational basis for a disputed classification must be shown to exist," at 592.

The standard of reasonableness under the rational basis test is whether any set of facts reasonably may be conceived to justify the discrimination, Ann Arbor versus National Center for Manufacturing Sciences, Incorporated, 204 Michigan Appeals, 303, 1994.

Plaintiffs specific challenge is that section 134(5) was not enacted for a legitimate state purpose because it was, they argue, solely

intended to raise revenue by increasing the retaliatory taxes paid by foreign insurers.

The United States Supreme Court in Western and Southern Life Insurance Company versus State Board of Equalization, 451 U.S. 648, 1981 -- I'm omitting the parallel cites -- considered the constitutionality of the California retaliatory tax.

In deciding to uphold the tax the Court stated:

> "In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions. One, does the challenged legislation have a legitimate purpose? And two, was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?
>
> The legislative purpose of California's retaliatory tax is not difficult to discern, for such taxes have been a common feature of insurance taxation for over a century. Although variously expressed, the principle purpose of retaliatory tax laws is to promote the interstate business of domestic insurers by

deterring other states from enacting discriminatory or excessive taxes. A survey of state retaliatory tax laws summarized:

> Whatever their character, it is obvious that their ultimate object is not to punish foreign corporations doing business in the state, or retort the action of the foreign state in placing upon corporations of the enacting state doing business therein burdens heavier than those imposed upon corporations of such foreign state doing business in the enacting state, but to induce such foreign state to show the same consideration to corporations of the enacting state doing business therein as is shown to corporations of such foreign state doing business in the enacting state.

California's retaliatory tax is based upon a model statute drafted by the insurance industry and is virtually identical to that enacted by many other states.

Since the amount of revenue raised by the retaliatory tax is relatively modest, and the impetus for passage of the tax comes from the nationwide insurance industry, it is

> clear that the purpose is not to generate revenue at the expense of out-of-state insurers, but to apply pressure on other states to maintain low taxes on California insurers," 451 U.S. at 668 and 69. Citations are omitted.

In enacting the current retaliatory tax in 1987, the legislative stated in the statute itself that its purpose was to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes. Clearly the retaliatory tax is consistent with this stated purpose and, thus, meets the Western and Southern test.

The Court fails to see, however, how section 134(5) of the Insurance Code deters other states from enacting discriminatory or excessive taxes against Michigan insurers. That section imposed a blanket prohibition against foreign insurers receiving a tax credit for payments made to third party associations. It did not condition the prohibition on whether a foreign state imposed similar burdens.

Moreover, the history behind the current RT and section 134(5) indicates that the impetus for its enactment was to fill the tax revenue void left by the repeal of the premium tax and not to deter other states from discriminating against Michigan insures.

First, the parties have stipulated that the third party assessments at least in this case were, until the enactment of section 134(5) in 1988, considered burdens under the original and current 1987 versions of the RT.

Section -- second, excuse me, plaintiffs have referenced considerable evidence consisting mainly of internal state memorandi regarding solutions to the 1988 tax revenue shortfall, which strongly indicate that section 134(5) was added to pending, tangentially related legislation in order to generate additional tax -- excuse me, additional insurance tax revenue.

Third, Judge Giddings determined in the State Farm matter, in 1992, that 1990 PA 256, which added the Assigned Claims Facility to the list of third party associations contained in section 134(5), was unconstitutional because it was enacted for the purpose of generating additional insurance tax revenue from foreign insurers. Plaintiff's brief, Exhibit C.

Defendant did not appeal this decision. And it is, therefore, binding with regard to assessments paid to the Assigned Claims Facility. In fact, defendant concedes that plaintiffs are entitled, pursuant to this decision, to a refund for 1996 in the amount of $30,078.

Defendant has not attempted to distinguish the State Farm case from the present. One is only able to assume, since defendant did not appeal Judge Giddings' decision, that it did not believe in the merits of its position, a position similar to that asserted in the present matter.

Furthermore, it stands to reason that if 1990 PA 256 was unconstitutional, then section 134(5) must also be unconstitutional.

In light of the foregoing, the Court is of the opinion that section 134(5) was not enacted for a legitimate state purpose and it is, therefore, invalid under Western and Southern, supra.

The Court will, therefore, grant the Motion for Summary Disposition with respect to the 1996 claims, and I will approve an order accordingly.

Thank you.

MR. VanTIFLIN: Thank you, your Honor.

MR. SMITH: Thank you, your Honor.

(At 11:04 a.m., approximately, court recessed)

STATE OF MICHIGAN)

COUNTY OF INGHAM)

I certify that this transcript, consisting of 24 pages, is a complete, true, and accurate transcript in the matter of TIG Insurance Company, Inc. vs Revenue Division, Department of Treasury, State of Michigan, Docket No. 96-16428-CM, consolidated with TIG Premier Insurance Company, Inc., vs Revenue Division, Department of Treasury, State of Michigan, Docket No. 96-16429-CM, held on Wednesday, October 1, 1997.

Dated: 1/23/98

/s/ Jody A. Larsen

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MICH. COMP. LAWS ANN. § 500.134(5) and (6)

§ 500.134. Savings clause; certificates of authority or licenses; applicability of administrative procedures act; associations or facilities, disclosure, etc.

* * * * *

(5) Any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a calculation under section 476a, and any premium or assessment paid to an association or facility shall not be included in determining the aggregate amount a foreign insurer pays to the commissioner under section 476a.

(6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:

(a) The Michigan worker's compensation placement facility created under chapter 23.

(b) The Michigan basic property insurance association created under section 29.

(c) The catastrophic claims association created under chapter 31.

(d) The Michigan automobile insurance

placement facility created under chapter 33.

(e) The Michigan life and health insurance guaranty association created under chapter 77.

(f) The property and casualty guaranty association created under chapter 79.

(g) The assigned claims facility created under section 3171.

MICH. COMP. LAWS ANN. § 500.476a(1) and (2)

§ 500.476a. Foreign insurers; reciprocal taxes, fines, penalties and other chrages; disclosure of information

Sec. 476a. (1) Beginning August 3, 1987, whenever, by a law in force outside of this state or country, a domestic insurer or agent of a domestic insurer is required to make a deposit of securities for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, or otherwise, or a special burden or other burden is imposed, greater in the aggregate than is required by the laws of this state for a similar alien or foreign insurer or agent of an alien or foreign insurer, the alien or foreign insurer of that state or country is required, as a condition precedent to its transacting business in this state, to make a like deposit for like purposes with the state treasurer of this state, and to pay to the revenue commissioner for taxes, fines, penalties, certificates of authority, valuation of policies, and otherwise an amount equal in the aggregate to the charges and payments imposed by the laws of the other state or country upon a similar domestic insurer and the agents of a domestic insurer, regardless of whether a domestic insurer or agent of a domestic insurer is actually transacting business in that state or country. In the case of fire department or salvage corps taxes or other local taxes the amount shall be computed by the

revenue commissioner by dividing the total of the payments made by domestic insurers in that state or country by the gross premium received by domestic insurers in that state or country less return premiums. The commissioner shall revoke the certificate of authority of an alien or foreign insurer refusing for 30 days to make payment of fees or taxes as required by this chapter. Except as provided in subsections (3) and (4), for purposes of this section, an insurer organized under the laws of a state or country other than these United States shall be considered an insurer of the state in which its general deposit for the benefit of its policyholders is made.

(2) The purpose of this section is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes.

* * * * *